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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 438

Sybil A. Edmunds Petitioner

VS

LENA MARIE WAIDE,
and RAY WAIDE,
[redacted],
Respondents,

[redacted]

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Illinois

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That on October the 11, 1954 an Order Extending Time to File Petition for Writ of Certiorari was granted to the Petitioner, Syble H. Behrends, by Associate Justice of said Court until November 10, 1954 including said date.

This case comes to the Supreme Court of the United States on a Writ of Certiorari from the Supreme Court of the State of Illinois. This case was filed in Brown County, Illinois, on a petition to set aside a deed of conveyance to a daughter. The complaint consisted of two Counts in Chancery filed on August 1, 1952, setting forth

that she was the owner of a tract of land described as follows:

> The North Forty-five (45) acres of the East Half of the Southeast Quarter (SE¼) of Section Twenty-seven (27) in Township One (1) South, Range Three (3) West of the Fourth Principal Meridian situated in the County of Brown and State of Illinois.

That a quitclaim deed was fraudulently written and obtained by defendant, Lena Marie Waide and her husband, Ray Waide for no consideration. That the said deed was never delivered.

This case was tried in the Circuit Court of Brown County and heard before the Master in Chancery, Joseph R. Morton. A report of the Master was made refusing to grant any relief to the plaintiff and a decree was granted affirming the Master's report by the Circuit Judge.

This case was appealed to the Supreme Court of Illinois and there affirmed. From this opinion of the said Supreme Court of Illinois this Writ of Certiorari is presented to the Supreme Court of the United States.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

This is a Petition for a Writ of Certiorari to the United States Supreme Court to the Supreme Court of the State of Illinois and Brief in support of same.

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I.

Opinion of the Supreme Court of Illinois.

(No. 33146.—Decree affirmed.)

SYBLE H. BEHRENDS, Appellant, *vs.* LENA MARIE WAIDE *et al.*, Appellees.

Opinion filed May 24, 1954—*Rehearing denied July* 13, 1954.

APPEAL from the Circuit Court of Brown County; the HON. FRED G. WOLFE, Judge, presiding.

J. W. TEMPLEMAN, of Springfield, for appellant.

BELLATTI, ARNOLD & FAY, of Jacksonville, for appellees.

MR. JUSTICE FULTON delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Brown County, dismissing for want of equity the complaint herein which sought to set aside a deed from appellant to her daughter, Lena Marie Waide. A freehold being involved, the appeal comes directly to this court.

The appellant, Syble H. Behrends, filed her complaint in chancery in the circuit court of Brown County alleging that on October 7, 1950, she was the owner of a certain 45 acres of real estate. The complaint stated that in reliance upon fraudulent representations made to the appellant by the appellees, her daughter and son-in-law, that she was to sign a document to obtain new eyeglasses, she executed a quitclaim deed for the premises in question to her daughter; that she was 80 years of age; that her eyesight was poor and that other arrangements had been previously made for the descent of said real estate. A copy of the quitclaim deed was attached to the complaint and made a part thereof which showed the conveyance to have been made on October 7, 1950, and that the grantor reserved unto herself a life estate therein.

Subsequently, the appellant filed an amendment to her complaint by which she added a second count alleging that on October 7, 1950, she was induced by the appellees to make a trip to Jacksonville, Illinois, to consult an optician in regards to her eyes; that after said examination she was taken to the office of attorney Foreman who had in his possession a prepared deed and will which he told her to sign and which she did sign without any information from said attorney as to the contents or meaning of said documents. She further alleged that because of her poor eyesight she was unable to read and that upon leaving the attorney's office she took the deed and will home and there she requested the defendant, Lena Marie Waide, to deliver them to the banker to be placed in her safety-deposit box. By her amendment appellant claimed the deed to the premises in question was never delivered to her daughter for recording but that the same was in fact recorded by her against the will of the appellant and without her consent. The complaint and amendment thereto prayed that the deed in question be set aside and declared null and void. Answers were filed by both appellees and issues were thereupon formed upon the question of fraud claimed in the original complaint and upon the question of delivery as framed in the amendment. The cause was then referred to a master to take testimony and to report his conclusions.

The oral and documentary evidence presented before the master tended to show that on February 28, 1920, the appellant joined with her husband in a conveyance of the property, which is the subject matter of this suit, to the appellant, Syble Behrends. In the year 1948, Tonie K. Behrends executed his will by the terms of which he divided his real estate among his two sons and his daughter, the appellee Lena, subject to a life estate in the appellant.

Paragraph Fifth of the will devised the 45 acres in question to the appellee Lena Marie Waide, subject to the life estate and then directed "that she pay to my son, Leo H. Behrends the sum of Two Thousand Dollars ($2,000.00) within six months of the death of my said wife, or within six months of my death if my said wife fails to survive me." On May 24, 1950, Tonie K. Behrends died and thereafter his will was admitted to probate. The record contains many incompetent remarks of witnesses and there is the usual amount of contradiction as to immaterial matters. On the main issue in the case, namely, the circumstances under which the deed executed on October 7, 1950, was handed from the appellant to the appellee Lena, there is also contradictory testimony. Briefly stated, the testimony of the appellant was to the effect that she believed the appellees drove her to Jacksonville for the sole purpose of obtaining new glasses. Afterwards they took her to the office of attorney Foreman, whom she did not know. He told her to sign the deed in question and a will without reading or explaining either of the documents to her. Appellant stated she was unable to read and that at the time of testifying before the master she did not know the contents of either document. On the way home from the attorney's office, she said she handed the papers to her daughter with the directions to take them to the banker to be placed in her bank box.

The testimony of the appellees on the question of delivery was, in substance, that the appellant handed the deed and will to Lena and told her that the deed was hers and not to worry about it and to leave the will with the banker to be put in the safety-deposit box. The appellant and the two appellees were the only persons present at the time possession of the documents was transferred from

the appellant to Lena. The fact that the deed had been recorded seemed to be the only circumstance bothering the appellant, for she reiterated on both direct and cross-examination that Lena was to have the property upon her death just as her husband had provided in his will.

Attorney Foreman was called to testify on behalf of the appellees, and, over objection, he testified concerning the conversation with the appellant in his office. He also stated he questioned appellant in the presence of his secretary as to the manner in which she wished to leave her property by will. The secretary recorded the questions and answers in shorthand, and a transcription of the same was read into the evidence. The secretary was called to testify from her shorthand notes as to the same inquiries and responses thereto. It is unnecessary at this point to examine the testimony in closer detail or to discuss the testimony of other witnesses.

Following the hearings before the master but before the filing of the master's report, the appellee's filed an amendment to their answer in which they set forth the conveyance of the 45 acres from Tonie K. Behrends to the appellant in 1920; the fact that he died testate on May 24, 1950 leaving a will the provisions of which have been heretofore discussed; and that the title to the property in dispute had become vested in the appellee Lena Marie Waide by reason of the acceptance by the appellant of the provisions of said will and her failure to renounce the same. The amendment prayed that the complaint be dismissed for want of equity. Objection was made to the filing of the amended answer on the grounds that the matter was then pending before the master in chancery, that it constituted a separate suit and that other parties who were not joined in the present suit were interested in the con-

struction of said will. Subsequently, a reply was filed to the amended answer asking that it be stricken.

The master filed his findings and concluded that the testimony of Attorney Foreman was competent; that no fraud was shown; that appellant failed to prove the allegations of her complaint and amendment thereto by the greater weight of the evidence; that said deed was in the nature of a voluntary settlement; that the acts of the appellant in connection with the administration of the estate of Tonie K. Behrends did not constitute an election to surrender the remainder after her life estate and have the same pass under the will of Tonie K. Behrends; that Lena Marie Waide is now seized in fee simple of the title to said real estate under said deed subject to the life estate of the appellant; and that the equities were with the appellees.

The master further found from the evidence that the appellant, Syble H. Behrends, in the fall of 1950, paid to her son Leo R. Behrends the sum of two thousand dollars ($2,000.00), which corresponds, in the amount, with the sum Leo was to receive from Lena Marie Waide under the will of his father, Tonie K. Waide, deceased; that she did not give to either of her other children a sum of money comparable to the amount she gave Leo, and that a fair inference would be that this payment indicated a desire on the part of the appellant to carry out the terms of her husband's will.

It seems strange that on appeal appellant should argue that the weight of the evidence would support a finding that she had elected that the property pass under the will of her deceased husband, for it would appear that, if this be so, any reason for setting aside the quitclaim deed

to Lena is eliminated, since the fee title was lodged in Lena by virtue of the will.

The court found that the findings and conclusions of the master were fully supported by the evidence and by the law and entered a decree approving same and dismissed the complaint for want of equity.

The decree of the circuit court of Brown County is therefore affirmed.

Decree affirmed.

II.

Jurisdiction.

Jurisdiction is predicated on said facts and the law applicable to the trial of this case in the Courts of the State of Illinois.

This suit was a suit by plaintiff to set aside a deed for fraud and non-delivery to defendants, consisting of two Counts.

The defendants Waides are a daugther and a son-in-law of plaintiff's, who obtained the deed under the following circumstances. The defendants went to Jacksonville to a lawyer by the name of Orville N. Foreman in Morgan County, and consulted him relative to a deed from plaintiff. A deed was prepared on September 14, 1950 by said Foreman and completely filled out even as to the acknowledgement by said Foreman as a Notary Public for said 45 acres of land owned by plaintiff, Behrends. This deed was delivered to Waides to obtain the signature of Syble H. Behrends on the deed as she owned it. This was all done by and in the office of said Foreman who had never seen Syble H. Behrends.

The Waides took the deed and left the office of said Foreman but never obtained the signature to said deed. On October 7, 1950, the Waides took plaintiff to Jacksonville, Illinois, to get some glasses as she could not see to read. The defendant daughter of plaintiff took plaintiff into Foreman's office where for the first time plaintiff met and saw said Foreman and there plaintiff signed the deed that had been prepared on September 14, 1950, by Foreman. Plaintiff could not read the deed and Foreman did not read the deed to her. She took the deed and a Will which had been drawn by said Foreman, paid Foreman $15.00 by check for the legal services rendered.

She took the deed and Will home with her and gave them to the daughter, Lena Marie Waide, a defendant herein, with the directions to deliver the deed and Will to the bank where she, plaintiff had a safety box and to place them in said box.

The defendants filed an answer to said complaint, which contained two Counts, one based upon fraud, the other charged non delivery of said deed.

The case was referred to Joseph R. Morton, Master in Chancery, appointed by the Circuit Judge of Brown County, Illinois, to make and report his findings on the law and facts applicable to the same in this case. The case was referred to said Master on January 5, 1952 (Abst. 8). Most of the testimony was taken by the Master on different days and hearings.

On April 13, 1953, the defendants filed what they termed an Alternative Defense to plaintiff's cause of action (Abst. 8-10).

A motion was filed to strike and dismiss this Alternative Defense by plaintiff (Abst. 11). This suit was pending before the Master. He at that time had jurisdiction of the case and for the Circuit Court to get and have jurisdiction for any purpose it was necessary under the law to have the case referred to the Circuit Court. Also new matter was brought in not germane to the suit and new parties and none were served nor did any party enter his appearance (Abst. 11). Exhibit A, record of Circuit Court 399. This deed was acknowledged by said Foreman and set forth in said acknowledgment that Syble Behrends was present and signed the deed. The facts were disclosed by both defendants and Foreman that the petitioner had never seen Foreman nor was she present.

Evidence of Plaintiff.

The Plaintiff's evidence abstract in the record, Page 3 abstract Page 13, Syble H. Behrends went to Jacksonville, with defendants haven't been able to read for 2 years, then to the Lawyers office, where he had a typewritten paper. It was not read to me, I did not know what was in it. He (the lawyer) told me to sign it. I did I paid him $15.00 Dollars, I gave the two papers to my daughter on our way home to put in my bank box. She said she would. She had the deed recorded. I did not give the deed and will to her to record, no delivery for the purpose of recording. Deed admitted in evidence (Abst. 18). dated 7th day of September A.D., 1950.

See of the evidence in the Record certified by the Circuit Clerk of Brown County, Illinois.

The abstract of the evidence is in the Record of the Clerk of the Supreme Court, Page 3 Abst. Exhibit (one).

The Fraud in making a deed certifying that the grantor Syble H. Behrends was present when in fact Orville Foreman had never seen plaintiff, the grantor, nor did he change the acknowledgment in the deed, from September to October, when Syble H. Behrends was in his office. Exhibit A record of Circuit Court 399. This deed was acknowledged by Foreman and set forth in said acknowledgment that Syble H. Behrends was present and signed the deed. The facts were disclosed by both defendants and Foreman that, the petitioner had never seen, nor was she present when Foreman prepared the deed. The deed was delivered to the defendants, Waides by Orville N. Foreman with instructions. The defendants left with the deed prepared for the signatures of the petitioner, Syble H. Behrends. This plan was the beginning of the

fraud to obtain a deed to the property by defendants, Waides.

In the petition for a rehearing there appears the testimony of Ray Waide, one of the defendants in questions, and answers, This witness admitted that he made a false statement before the Commissioner when he testified. Ex. Petition for Rehearing (page 12), Page 2 Rehearing.

The other testimony of the other witnesses reaffirm the testimony of the plaintiff as disclosed by the Abstract of Plaintiff (Ex. 3 record in the Files).

The Fraud in making a deed certifying that the grantor, Syble H. Behrends, was present when, in fact, Orville Foreman had never seen the said Plaintiff, Syble H. Behrends, nor did he change the acknowledgment in the deed from September to October, when Syble H. Behrends was in his office.

III.

POINTS AND AUTHORITIES.

The Federal question raised is in the filing of "Alternative Defense to Plaintiff's cause of action", when the case was pending before the Master and all the evidence was practically in. (Abst. 12). This alternative defense brought in facts and parties that were not in issue and the parties were never summoned nor did they enter their appearance. The plaintiff filed objections to said Alternative Defense which was denied by the Court. The same question was again raised when the plaintiff filed her Reply. (Abst. 12).

And the same question was presented to the Supreme Court. The fraudulent securing and taking the property without these parties and the issues raised is taking property without due process of law. The whole issue raised by this false issue was the issue tried by the Courts. The Supreme Court ignored the question and passed upon this false issue. The Court ignored the same question raised in the Petition for Rehearing. The Supreme Court ignored the constitutional questions raised by the Plaintiff and decided the case on the false issue raised by the Alternative Defense. Nowhere in the opinion does the Supreme Court mention the real question involved in the case.

1.

The introduction of the will of Tonie K. Behrends brought in new parties in interest who are not parties to this due process of law, thus violating the Constitution of the State of Illinois and the Constitution of the United States.

Petition for Rehearing, Page 4, Par. 2.

Warren v. *U.S.*, 340 U.S. 523.

Aguilar v. *Standard Oil Co.*, 318 U.S. 724.

Lichter v. *U. S.*, 334 U.S. 742-66-68.

Also Gressman Supreme Court Practice - 1950.

2.

The trial court considered matters which were not germane to the issues and without proper parties to the suit.

A. The additional defense filed was not germane to the issue of the delivery of the deed in question.

B. All persons interested in the subject matter of the suit should have been made parties.

Georgeoff v. *Spencer*, 400 Ill. 300, 302.

London & Lancashire Indemnity Co. v. *Tindall*, 377 Ill. 308, 315.

C. It was error for the trial court to hold that plaintiff had made an election not to have the property in question pass under the Will of Tonie K. Behrends.

Oglesby v. *Springfield Marine Bank*, 395 Ill. 37, 62.

Palenske v. *Palenske*, 281 Ill. 574, 578.

Martin v. *Casner*, 383 Ill. 260, 265.

3.

The weight of the evidence was contrary to the trial court's finding that the deed was delivered.

A. Question of delivery is one of both law and fact.

Creighton v. *Elgin*, 387 Ill. 592, 604.
Elliott v. *Murray*, 225 Ill. 107, 112.

B. Giving manual possession of a deed to the grantee to take it to another on behalf of the grantor is not a delivery of such deed.

Rothenberg v. *Rothenberg*, 378 Ill. 242, 247.

C. Mere manual possession of a deed by a grantee is not necessarily an acceptance thereof.

Seibert v. *Seibert*, 379 Ill. 470, 478.
Elliot v. *Murray*, 225 Ill. 107, 113.

D. Mere fact that a deed has been recorded, is, of itself, only prima facie evidence of delivery.

Creighton v. *Elgin*, 387 Ill. 592, 604.

4.

The testimony of Orville N. Foreman was incompetent.

Orville N. Foreman's testimony was not competent against his client, the plaintiff. An objection to his testimony on the ground it involved privileged communications, was duly made at the beginning of his testimony and a motion to strike it was made at the end of his testimony. In addition, the objections to his testimony ran to each and every question and answer (Abst. 19, 23). The following facts are proof that his testimony concerned privileged communications: Plaintiff was his client at the time (Abst. 23); she paid him for his services (Abst. 22); no one else was present (Abst. 22); he advised plaintiff on her Will, the deed in question and the Will of her husband (Abst. 20, 21); she at no time released Foreman

to testify (Abst. 26). Under this state of facts, Foreman's testimony was incompetent.

In Re Estate of Busse, 332 Ill. App. 258, 266.

Foreman testified he received no compensation from plaintiff for drawing the deed in question. Whether Foreman received compensation or not makes no difference.

Dickerson v. *Dickerson*, 322 Ill. 492, 499.

Conclusion.

It is therefore urged that the Writ of Certiorari be granted in this case, as I feel quite sure every right of the plaintiff has been violated including her Constitutional rights, even more than due process of law.

All these points were raised by proper motions and objections before the master and before the Circuit Court and before the Supreme Court of Illinois.

Respectfully submitted,

J. W. Templeman,
Attorney at law and a member of this court since March 26th, 1940.